The Solicitors' Journal

Vol. 97 January 17, 1953 No. 3

CURRENT TOPICS

London Tree Preservation and House Purchasers

TREE preservation orders are, it appears from a recent announcement, to be issued in London at the rate of one a week. When an order is confirmed by the Minister of Housing and Local Government, trees affected by the order may not be lopped or topped without the consent of the London County Council. This is a matter of some importance to house purchasers where trees obscure the light of front windows. Possibly there will be cases where the council consider that public amenity in accordance with the town planning laws overrides private convenience. Minor pruning operations will possibly not be considered as falling within the provisions of the orders, but solicitors advising purchasers of houses in London will no doubt inquire whether any preservation order has been made, and will advise their clients accordingly.

Housing Accommodation and the Discontinuance of Defence Regulation 68CA

CIRCULAR No. 94/52, issued on 18th December, 1952, by the Ministry of Housing and Local Government, refers to the revocation of Defence Regulation 68CA by an Order in Council (S.I. 1952 No. 2091) which came into effect on 7th December, 1952. After noting that from July, 1948, onwards the permission of the local planning authority has been required under the Town and Country Planning Act, 1947, in respect of any material change of use, the circular states that the need to prevent loss of housing accommodation where possible is as great as ever and local planning authorities should always bear this in mind when dealing with applications for planning permission. The circular makes it clear that under the Act a local planning authority, having had regard to all the material considerations, may refuse permission for development, notwithstanding that the development would be in accord with their development plan. When circumstances have changed and the housing situation has become easier, a permission may be granted on a fresh application. By a direction, a copy of which is attached to the circular, the Minister has provided for consultations by planning authorities with housing authorities on individual applications for change of user, and, in the event of disagreement in any individual case, for reference of the application to the Minister. For making the best use of housing accommodation, the Minister has appointed a sub-committee of the Central Housing Advisory Committee " to examine local authorities' existing practice and experience with regard to (*a*) the exchange of tenancies, and (*b*) the fixing and review of rents and the granting of rent rebates in respect of their houses and flats; to consider, in the light of the results of that examination, what more could be done towards securing the best use of existing housing accommodation, whether in local authority ownership or otherwise; and to make recommendations."

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Defence Regulations and Clubs

AMONG the Defence (General) Regulations, 1939, which expired last month and have not been renewed were reg. 42CA (Unlawful gaming parties) and 55C (Restrictions on registration of new clubs). The former regulation related to parties organised for the playing of games of chance or of chance and skill, and does not appear to have been invoked much by the police of late years. The expiration of the regulation relating to clubs, however, is of more interest; the regulation gave the police a right to object to the registration of any new club at which intoxicating liquors would be supplied to the members or guests. The position is now governed by the Licensing (Consolidation) Act, 1910, s. 92. Any person or body now wishing to start a club, at which intoxicating liquor is to be supplied, need only register it with the local clerk to the justices or, in London, the clerk of the local metropolitan police court or City of London Special Sessions, as the case may be. (There is a special provision as to clubs in Oxford mainly composed of past or present members of the university.) Particulars required to be furnished to the clerk are now much less voluminous than were required under the regulation, and the police no longer have any right to object to its registration.

Attestations by Spouses

THE CHIEF LAND REGISTRAR, writing to *The Times* of 7th January in answer to a previous letter by LORD ASQUITH OF BISHOPSTONE asking why most share transfer forms contain a requirement that the transferor's spouse must not attest his signature, stated that he had changed the practice of the registry so that documents are now accepted for registration without question on this score. Professor A. L. GOODHART, Q.C., also replied to Lord Asquith's direct appeal to him in his letter to explain why the provision was contained in most share transfer forms. There was, he wrote, no legal but only an historical reason for the practice, and cited Wigmore on Evidence (1940, 3rd ed., p. 601), where the current rule was described as a piece of semi-mediæval metaphysics and Coke's Commentaries on Lyttleton's Tenures was quoted. Since the Evidence Act, 1853, which provided that husbands and wives of parties in a civil proceeding should be competent and compellable to give evidence, there has been no legal reason, he wrote, why they should not act as witnesses to a spouse's signature. Perhaps, after these pronouncements by the highest authorities, those who are responsible for the continuance of the practice will do something to bring it to its long-deferred end.

Mr. Arthur Holte Macpherson

THE death of Mr. ARTHUR HOLTE MACPHERSON at the age of 86 on 7th January, 1953, was heard with regret by many who knew him as a busy solicitor in London, and also by those who knew him as an expert on ornithology. He was a son of the late Sir Arthur G. Macpherson, K.C.I.E., and was educated at Marlborough College and at Trinity College, Oxford, where he obtained the M.A. and the B.C.L. degrees. He was admitted as a solicitor in 1904. From 1918 to 1931 he was a director of Watney, Combe, Reid and Co., Ltd. His main interest in later life was bird watching. He was on the council of the Royal Society for the Protection of Birds and a member of H.M. Office of Works Committee for Bird Sanctuaries in the Royal Parks. For his study on "Comparative Legislation for the Protection of Birds" he received the gold medal of the Royal Society for the Protection of Birds.

The Incorporated Law Society of Liverpool

THE one hundred and twenty-fifth report of the proceedings of the Incorporated Law Society of Liverpool presented at the annual general meeting on 15th December, 1952, records that the society consists of 454 members, and 66 barristers and others, not being members, subscribe to the library. During 1952 there were ten committee meetings and eighteen sub-committee meetings. On the occasion of a joint deputation from the Manchester and Liverpool societies, the Lord Chief Justice stated that as a long-term plan he was prepared to sponsor legislation for the setting up of a Central Criminal Court for the North-West area with two judges, approximating to the Recorder and the Common Serjeant in London, to constitute a permanent court to deal with crime. Before taking any further steps he desired the considered views of the Liverpool and Manchester societies thereon, and after careful consideration it was held that the proposed court should sit alternately in Liverpool and Manchester. These views were submitted to the Manchester society who intimated they were in full agreement, and a letter was addressed to the Lord Chief Justice accordingly. In his address to the meeting the retiring President referred to this proposal to set up a Central Criminal Court in the North-West area and said that there were in September over 500 cases awaiting trial; after the assize there still remained 432. He also referred to the statutory committee set up under s. 56 of the Solicitors Act, 1932, of which, with the late President of The Law Society, Mr.—now Sir Geoffrey—Collins, he was a member. He thought that The Law Society should continue to press for a complete change in the present law with regard to solicitors' remuneration.

The Manchester and Salford Poor Man's Lawyer Association

THE Annual Report for 1951–52 of the Manchester and Salford Poor Man's Lawyer Association shows that a total of 4,263 cases were dealt with during the year, an increase of 251 over the previous year. Of these, 2,702 cases were dealt with at the centre, 1,173 were referred to solicitors, and 388 were referred to the Legal Aid Committee. Forty-six per cent. of the cases were matrimonial and family cases, 14·5 per cent. were landlord and tenant cases, 6·5 per cent. were damage and accident cases, 8 per cent. were industrial injury cases and 5 per cent. were concerned with debt and money matters. It was of interest to conducting solicitors that arrangements have been made with The Law Society for cases which fall within the provisions of the Legal Aid and Advice Act in such circumstances that the intending litigant is able to apply for a certificate to be referred to solicitors on the conducting rota of the Association, in exactly the same way as such cases were referred in the past. The Law Society intimated that if too many of such cases were referred to any one solicitor, this would not meet with approval, but, provided the number so referred was reasonable, then the dispensation, as it were, applies. Prior to this arrangement being made, the Committee was advised that all such cases must be referred direct to The Law Society's local Secretary. The Report also records a grant by The Law Society of a general waiver to enable conducting solicitors to act without making a charge in suitable cases which would not come within the purview of the Legal Aid and Advice Act as at present in force. Conducting solicitors are also informed that once they have acted for a client referred to them by a Centre, they are perfectly at liberty to act for that individual in a subsequent case in a private capacity.

Taxation

LEGACIES, DEVISES AND DEATH DUTIES

BEFORE legacy duty and succession duty were both abolished by the Finance Act, 1949, it was very common to insert into wills various provisions whereby bequests were made " free of duty," " free of death duties," " free of legacy duty," or the like. Since 1949 the tendency is to omit such provisions although, of course, wills made before 1949 will continue to show them when testators die. The purpose of this article is to examine how far they are effective in the case of deaths after 1949, and how far they should still be included in wills now being drawn. Of course, provisions such as " free of legacy duty " or " free of succession duty " are now dead letters, but the more general provisions can still have considerable effect.

BASIC PRINCIPLES

As a basis for the investigation five propositions of law will be stated :—

(1) Estate duty payable on personalty is a testamentary expense, whilst estate duty payable on realty is not, and is not made such an expense by the 1925 legislation (*Re Owers* [1941] Ch. 17).

(2) As a testamentary expense duty on personalty is payable out of general residue, whilst duty on realty is not (*Re Webber* [1896] 1 Ch. 914).

(3) Pecuniary legatees, in the absence of express words charging the realty with the payment of their legacies, look to the personalty and cannot look to the realty and have to go short insofar as the personal estate is insufficient to satisfy them, unless the testator makes the residue a mixed fund or gives the realty and personalty, as a mass, to the residuary legatees (*Greville* v. *Browne* (1859), 7 H.L. Cas. 689).

(4) Where a testator bequeaths legacies and then bequeaths the residue of his realty and personalty in a mass, the legacies are charged on the realty, but are payable primarily out of the personalty unless the testator directs that they are to be paid out of the mixed fund, in which case they are paid rateably out of realty and personalty (*Re Boards* [1895] 1 Ch. 499).

(5) So far as legacies are satisfied out of that portion of a mixed fund attributable to realty they are real estate and must pay their own duty notwithstanding a direction to pay " testamentary expenses " out of the mixed fund (*Re Spencer-Cooper* [1908] 1 Ch. 130).

EXAMPLES

Suppose a testator to leave an estate of £120,000 made up of realty £70,000 and personalty £50,000. Estate duty is at 50 per cent. and there are no debts. These high figures are taken in order to obtain an arithmetically convenient rate of duty and the principle is just as applicable in the case of an estate of £5,000.

Case I

The will provides for a specific devise of Blackacre, value £10,000, to *A* ; a specific devise of Whiteacre, value £10,000, to *B* ; and pecuniary legacies of £10,000 each to *C* and *D*. The residue of the real and personal estate to *XYZ*.

The result is that *A* and *B* take Blackacre and Whiteacre respectively, but each has to pay £5,000 in duty. *C* and *D* each take their £10,000 in full because the pecuniary legacies are payable primarily out of personalty—(4), above.

Case II

Is identical except that *A's* devise and *C's* legacy is stated to be " free of duty."

The result is that the estate duty on *A's* devise is thrown on to general residue and *A* is relieved of having to pay £5,000. *C* is not affected at all. That is to say, " free of duty " provisions are still very effective when attached to devises. That is hardly a novel proposition, but before the reader hands this article to the junior articled clerk let him persevere a little longer—the best (or the worst) is yet to be.

Case III

The gifts to *A*, *B*, *C* and *D* are identical with Case I, but instead of a direct gift of residue to *XYZ* there is a bequest, as is quite common, of all the real and personal estate other than that specifically bequeathed to the executors on the usual trust for sale, paying out of the proceeds the funeral and testamentary expenses and the legacies bequeathed by the will.

Here, as before, *A* and *B* take Blackacre and Whiteacre respectively and each pays £5,000 duty thereon. After those two properties are set aside there is a mixed fund of £50,000 realty and £50,000 personalty and the pecuniary legacies are charged rateably thereon—(4), above. So *C* and *D* each take not £10,000, but £7,500, because they must pay the duty upon that moiety of their legacies which is attributable to the realty.

This result of having a trust for sale may be a little surprising. In *Re Owers*, *supra*, Lord Greene, M.R., thought the matter one which gave rise to and would continue to give rise to unintended results ; indeed he thought it a trap into which testators fell and would continue to fall.

Case IV

Here, as in Case II, *A's* devise and *C's* legacy are expressed to be free of duty, but the residue is given upon trust for sale, as in Case III.

The result is that not only is the £5,000 duty attributable to *A's* devise shifted on to general residue, but so is the £2,500 duty which would have been payable by *C*. That is to say, a " free of duty " provision, although it may have originally been inserted with a view to legacy and succession duties, is nevertheless very effective indeed when attached to a pecuniary legacy.

Case V

Suppose the bequests to *A*, *B*, *C* and *D* to be exactly as in Cases I and III, but the executors to be directed to pay from the proceeds of sale " all funeral and testamentary expenses and all duties payable on my death."

This would have the effect of shifting the whole of the duties on to the general residue so that *A*, *B*, *C* and *D* would each have taken a net benefit of £10,000.

Case VI

This is not really concerned with " free of duty " provisions, but it may be included here by way of bonus and as a warning to all who draft wills. In this instance Blackacre and Whiteacre are devised to *A* and *B* as before, but each free of duty, whilst *C* and *D* get pecuniary legacies of £25,000 each. The testator then proceeds to " devise my real estate other than Blackacre and Whiteacre aforesaid and bequeath the

residue of my personal estate to *XYZ.*" This last provision is in similar form to that before the court in *Re Rowe* [1941] Ch. 343, and if reference be made to that case it will be found that this is not a gift of realty and personalty in one mass, but is a specific devise of realty and a residuary bequest of personalty which happen to be made to the same persons.

Now the directions that the two devises are to be paid free of duty operate to shift that duty on to the residuary personalty; they are in fact equivalent to pecuniary legacies of £5,000 each to *A* and *B*. Therefore, there are in all pecuniary legacies of £60,000 and the legatees cannot look to realty for their payment—(3), above. When the residual personalty has borne its duty at 50 per cent. it is reduced to £25,000 and there are claims upon it of £60,000. So the upshot is that *A* and *B* each have to pay £2,916 in duty, whilst *C* and *D* get only £10,416 each (to the nearest £) and they will probably require a good deal of explanation and persuasion before they sign the estate account.

Settled Bequests

Where there is a provision that some bequest shall be enjoyed " free of duty " or " free of duties " and the bequest is settled so that, before the will trusts are wound up, duty will be payable not only on the death of the testator, but also on the death of a life tenant or life tenants, the question can always arise whether the exoneration is confined to the duties payable on the death of the testator or whether it extends to all duties payable until the trust is wound up. If the answer to the question is that the exoneration does extend to future deaths the results can be inconvenient and unexpected. Inconvenient because no one can say with certainty what will be the rate of duty on the subsequent deaths, so that a large amount may have to be reserved to meet the contingent liability, and unexpected in that the life tenant may be very wealthy so that the duty amounts to 80 per cent.

What the answer is is always a matter of construction of the will concerned. Most of the numerous authorities are to be found collected in *Re Shepherd* [1949] Ch. 116 and in *Re Howell* [1952] Ch. 264. Vaisey, J., in the latter case, said:—

> " It was held by Harman, J., that there was a presumption that a testator only intended to provide for the payment of duties arising on his own death . . . I am not quite sure that I should have put it as strongly . . . but I think it accurate to say that there is a strong tendency against coming to a [contrary] conclusion . . . it is awkward to hold up the distribution of residue perhaps for a number of years . . . If testators desire to provide that the distribution of their estates shall be held up to meet these future duty claims, they ought to say so in unmistakable terms."

Summary

The different ways in which an estate may fall to be distributed are legion and the precise effect of a provision exonerating a bequest from duty must depend upon all the circumstances, but, generally:—

(*a*) " *Free of legacy and/or succession duties* "

Has no effect since 1949.

(*b*) " *Free of duties payable on my death* "

Will always operate to free devises from the estate duty which they would otherwise bear unless the fund available for pecuniary legacies is insufficient, when the devises will be freed *pro tanto*.

Will operate in the same way and subject to the same limitations to free pecuniary legacies from estate duty which attaches to them. Such estate duty will attach—

where the legacies are charged upon a mixed fund: rateably according to the proportions of realty and personalty;

where the legacies are not so charged, but where residuary realty and personalty are given as a mass: insofar as personalty is exhausted and the legacies are satisfied from realty.

(*c*) " *Free of all duties* "; " *free of duty*," *etc.*

It is a matter of construction of the will in each case whether such provisions are any wider than (*b*), above, in that they will extend to the duties payable other than on the death of the testator. See the above quotation from *Re Howell, supra.*

G. B. G.

A Conveyancer's Diary

NATHAN COMMITTEE: THE DEFINITION OF CHARITY

The scope of this committee's report is so large that it is difficult to decide how much of it is of immediate interest to the legal reader to whom questions concerning charitable trusts come once in a while in the ordinary course of business. He will be interested in the committee's consideration of the question whether the existing definition of charity for legal purposes should be amended or not, and also in its recommendations on the control to which charitable trustees are now subject in their dealings with the trust property, both real and personal; if charity is to be redefined, that may affect the advice to be given to testators and other donors intending to benefit charitable objects, and since there are a great many charitable trusts of different kinds in this country (the committee's estimate of the total for England and Wales, including educational trusts, is 110,000), the title to property often depends on a dealing therewith by a body of charitable trustees, and the importance of a sound knowledge of such trustees' powers is self-evident. The chapters of the report on the definition of charity, official custodians of charitable trust funds and property, and the control of dealings in land (the mortmain and charitable uses legislation) will, therefore, form the subject-matter of this " Diary " and the next.

The chapter on the definition of charity begins with the definition in s. 66 of the Charitable Trusts Act, 1853, which defines " charity " as meaning " every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning . . . of the statute of 43 Eliz. I c. 4, or as to which . . . the Court of Chancery has or may have jurisdiction." It is this enactment which has saved for us the famous preamble to the Elizabethan statute, which would otherwise have been repealed when the rest of the statute was repealed by the Mortmain and Charitable Uses Act, 1888. Often referred to, but seldom seen in full, this preamble is worth setting out, as it is set out in the Nathan Committee report, with only the spelling

changed to accord with modern usage. It recites that whereas lands and other property " have been heretofore given, limited, appointed and assigned as well by the Queen's Most Excellent Majesty, and Her most noble Progenitors, as by sundry other well disposed Persons, some for Relief of aged, impotent and poor People ; some for the Maintenance of Sick and Maimed Soldiers and Mariners, Schools of Learning, free Schools and Scholars in Universities, some for the Repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks, and Highways ; some for the Education and Preferment of Orphans ; some for or towards the Relief, Stock or Maintenance for Houses of Correction ; some for Marriages of Poor Maids ; some for Supportation, Aid and Help of young Tradesmen, Handicraftsmen and Persons decayed ; and others for Relief or Redemption of Prisoners or Captives ; and for Aid or Ease of any poor Inhabitants concerning payment of Fifteens, setting out of Soldiers and other Taxes . . . " [Fifteens : an ancient tax on personal property ; cf. tithes.]

Of this catalogue Lord Macnaghten said, in his famous judgment in *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, 581, that it was " so varied and comprehensive that it became the practice of the court to refer to it as a sort of index " ; and he then went on to set out the four principal divisions which, in his view, the expression " charity " in its legal sense comprised, viz., " trusts for the relief of poverty ; trusts for the advancement of education ; trusts for the advancement of religion ; and trusts for other purposes beneficial to the community, not falling under any of these preceding heads." The common denominator between all these four heads is that, in order that a trust may fall within any of them, it must be shown to be beneficial to the public.

Two questions were considered by the committee in connection with the definition of the legal concept of charity. One was the general question whether the concept should be redefined, and if so, in what terms, and with what effect on the existing body of case law ; this was the principal question. The other was whether the requirement of public benefit might not be relaxed in certain cases where, in the recent past, it has shown itself to be perhaps somewhat restrictive. This was a subsidiary question, and for convenience the committee's recommendations thereon may be taken first.

The requirement of public benefit was considered by the House of Lords in the recent case of *Oppenheim* v. *Tobacco Securities Trust* [1951] A.C. 297. It was there held that the employees of a public company in England, although in fact very numerous, did not constitute a sufficiently large section of the public to render a trust for the education of their children a trust for the benefit of the public for the purpose of satisfying this requirement. This was, however, a majority decision, Lord MacDermott dissenting. On the strength of this decision, and the doubts expressed by Lord MacDermott, it was represented to the committee that the law might with advantage be changed so as to put a trust for the benefit of a fairly large group of persons on the same footing as a trust for the benefit of the public at large, and it was pointed out in support of this representation that the present is a time when groups of employees under the National Boards and other large employers may number hundreds of thousands. But, although conscious of the difficulties which cases of this kind present, the committee felt that it would be a mistake to change the law in this direction ; if the law were so changed, in its view, it would not be long before the scope of charity would be enlarged, the definition of it would be undermined, and doubts and uncertainties would increase.

My personal view of this attempt to enlarge the scope of charitable trusts in this particular direction is that the committee was wise to resist it. Social and economic reasons can be adduced to support those based on purely legal considerations. Large employers of labour, with their superannuation funds and the other financial benefits that they can offer to the person in their employ, already enjoy enormous advantages over the smaller organisation, and apart from the stratification of society which this induces, and which most people regard as an economic evil in an age of rapid scientific advancement, any further growth of this tendency can only lead to the curtailment of the liberty of the individual. To the lawyer brought up in our traditions of law, that is a repugnant prospect.

On the more difficult, and fundamental, question of the definition of charity, there was substantial agreement among the witnesses who gave evidence before the committee, both legal and lay, that the content of the term " charity " as at present laid down in the cases was neither too wide nor too narrow ; that is to say, no good case was made for either adding to, or subtracting from, the number of the various objects which, in the present state of the law, may broadly speaking be regarded as charitable objects. I say " broadly speaking " because, although there was, apparently, agreement about the sufficiency of the content of the term " charity," some dissatisfaction must have been expressed by some of the witnesses about the inclusion or exclusion of certain trusts within one or other of the (admittedly satisfactory) broad divisions of charitable trust, since the committee was urged by some persons to render the definition of " charity " more flexible, and flexibility for this purpose can only mean the power for somebody to authorise the inclusion within the categories of charity of objects which are at present excluded. But the truth seems to be that the advocates of " flexibility " were not very logical in their representations. As the committee has reported : " We have been urged on the one hand to devise language which will be ' flexible ' and will accord with modern social and economic conditions and, on the other, to introduce a greater element of precision and certainty and thereby reduce the risk of litigation and of the founder's wishes being defeated. In not a few cases, the same witnesses urged both points simultaneously without apparently realising that they are largely incompatible."

That being so, and a proposal to define the meaning of charity exhaustively—by an enumeration of all charitable objects—being ruled out as being not only impracticable but wrong in principle, the question of defining the expression " charity " really resolved itself into this : was it advisable to leave the law exactly as it stood, or would it be better to replace the preamble to the statute of Elizabeth I with a classification on the lines of the *Pemsel* case, with a residual fourth head, and then to leave scope to the judiciary to interpret " public benefit " in the light of the conditions of the day ? On this question there was a division of opinion between the lay witnesses and the legal witnesses ; some of the former (with their view finding support from utterances from the judicial bench) regarded with equanimity the prospect of throwing into the melting pot all the case law on the subject ; the latter, apparently, considered this to be a substantial disadvantage in any attempt at a statutory definition. The committee's decision, as was perhaps inevitable, was a compromise between extremes. The committee was satisfied that if the primary object that the content of charity should remain flexible was to be secured, the law must continue to be judge-made, and that it was a complete delusion to suppose that to start with a clean slate

would reduce the volume of litigation. On the other hand, some modernisation of the language of the definition seemed to the committee to be desirable, and its recommendation therefore, in this respect, is that the existing definition by reference to the preamble to the statute of Elizabeth I should be repealed and replaced by a definition based on Lord Macnaghten's classification, but preserving the case law as it stands.

It is difficult to assess the value of this recommendation, at any rate if one is a lawyer and familiar with the *Pemsel* classification, which, if modern authorities are consulted, will be found referred to in full fifty times or more for each occasion on which the Elizabethan catalogue, or a substantial part of it, is cited. Perhaps the utility of this recommendation is intended to be found elsewhere. In other parts of the report there are recommendations for bringing up to date, by means of an extension of the *cy-près* principle and of the power of making schemes for the reorganisation of charities, many of the existing charities which time has outmoded, and it is recommended that in this process of modernisation of charitable purposes local authorities, who already have a considerable share in the administration of certain charities by rights of nominating trustees and the like, should be even more closely associated. To the persons who compose these local bodies the present amorphous definition of charity is, doubtless, largely incomprehensible, and its reformulation in language which they will understand is therefore an advantage. To the lawyer, nothing much will change if this part of the report is eventually accepted and acted on, and certainly the settling of a charitable trust will remain as much the task of the expert draftsman as it is to-day.

"A B C"

Landlord and Tenant Notebook

CONTROLLED TENANT BECOMING LICENSEE

LAST year saw so many new decisions on the question whether some agreement created a tenancy or merely conferred a licence that I felt that the "Notebook" ought not to deal with them all in full. But, though the last occasion when it did deal with one was on 15th November last (96 SOL. J. 743), the decision then discussed being *Torbett* v. *Faulkner* [1952] 2 T.L.R. 659; 96 SOL. J. 747 (C.A.), I think that, apart from the great interest shown in the distinctions drawn, the more recent *Murray Bull & Co., Ltd.* v. *Murray* [1952] 2 T.L.R. 1003; 96 SOL. J. 852, merits an article. For one thing, the decision illustrated, fortuitously perhaps, the limits of what was decided in *Morrison* v. *Jacobs* [1945] K.B. 577 (C.A.); for another, it shows that even the acceptance of an offer to occupy "as a quarterly tenant," qualified it is true by "at an economic rental under conditions which do not establish me as a controlled tenant," may bring into being a licence only.

The plaintiff company owned the lease of a London house (rateable value £64) on the ground and first floors of which they carried on their business of research and analytical chemists. In June, 1939, they let the second floor (which could be approached through the building or direct from outside) to the defendant, then their managing director, for a term of seven years or until the termination of his managing directorship "whichever is shorter," the agreement being recorded in a board meeting minute subsequently signed by the defendant. When the term expired, the defendant was still the company's managing director, and in occupation of the flat; and for a time he continued to hold the office and the flat, receiving his salary and paying the rent reserved by the expired lease.

It may be convenient to deal at this point with the reliance subsequently placed by the defendant on *Morrison* v. *Jacobs*, on the strength of which he contended that he had become a statutory tenant when the seven years' term had so expired and he had "held over." *Morrison* v. *Jacobs* decided that, after the expiration of a fixed term, the landlord of controlled premises need not give notice to quit before suing for possession merely because he had since that expiration accepted rent. The argument that a tenancy from year to year had been created was rejected because, as MacKinnon, L.J., said, the essential factor in non-control cases was that when a landlord has acquired a right to possession but refrains from turning the tenant out and accepts rent from him "the parties by their conduct may, with reason, be held to have entered into a new contract of demise"; whereas when a tenant remained in possession "not by reason of any such abstention on the part of the landlord, but because the Rent and Mortgage Interest Restrictions Acts deprive the landlord of his former power of eviction, no such inference can properly be drawn." The quotations show how important is/are reason and the reason. And in *Murray Bull & Co., Ltd.* v. *Murray*, McNair, J., recognised the distinction, by reference to reason, between cases in which an inference of holding over by agreement and retaining possession under the Rent, etc., Restrictions Acts would correctly be drawn. In the case before him, he was satisfied that the employer-employee relationship co-existing between the parties made all the difference, and warranted a conclusion that the holding over was by agreement.

The next important event occurred in 1950. In July of that year the defendant resigned his directorship; the company, by its chairman, wrote that the resignation would take effect as from 31st August and that he would be required to vacate the flat by 31st December. On 25th August he wrote: "May I inquire whether I may continue as a quarterly *tenant* of, etc., at the end of December at an economic rental under conditions which do not establish me as a *controlled tenant*. I am looking for a house, etc.," and on 5th September the chairman replied: "The remaining as a quarterly *tenant* . . . is a matter in which I am only too pleased to meet you as I know the difficulty you will be having in finding a suitable house. No doubt you will appreciate that the company may need the flat in the course of the coming months and naturally I know I can rely on you to vacate the premises when they are required." The defendant answered: "I am glad to know that I may remain as quarterly *tenant* at . . . until I find a house or until the flat is required by the company," going on to offer to pay a *rental* assessed by a local agent as reasonable; on 4th October the chairman wrote back: ". . . in view of the fact that the company may require the premises in the not too distant future, I wish the *rent* now paid by you to stand." And on 27th March, 1951, the defendant having remained in possession and made payments accordingly, a new managing director wrote on the plaintiffs' behalf requiring possession "as from the end of the second quarter of this year."

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For, as is now known, exclusive possession in return for periodic payments no longer makes an agreement any more than *prima facie* a tenancy agreement, even if language appropriate to a tenancy agreement be used. Licences for permissive occupation have been found to result in such cases as *Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 K.B. 496 (C.A.), in which a rent book was used; *Errington* v. *Errington* [1952] 1 K.B. 290 ("if the *circumstances* and the *conduct* of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no *interest in the land*, he will be held to be licensee only"); *Cobb* v. *Lane* (not actually cited in the recent case, and mainly of interest because of its application of passages in the earlier *Booker* v. *Palmer* [1942] 2 All E.R. 674 (C.A.) emphasising the importance of ascertaining intention); the recent *Torbett* v. *Faulkner, supra*, which was also not cited though there was some similarity between its facts and those before the court: in both cases there was a contract of service as well as an agreement for occupation.

McNair, J., came to the conclusion that in the circumstances of the case before him, and on the *proper construction* of the documents, it was plain that no more than a licence had been intended. The decision is of some significance because, though in at least one of the recent cases a rent book had not proved fatal to the grantors' contentions, in *Booker* v. *Palmer, supra*, Lord Greene, M.R., rather stressed the fact that negotiations had been conducted by telephone conversations, without at least any formal document being entered into; and Somervell, L.J.'s judgment in *Cobb* v. *Lane, supra*, includes a statement, at a point where he is emphasising that intention matters and must be inferred from circumstances: "I am assuming that there is no document or clear evidence of terms." In *Murray Bull & Co., Ltd.* v. *Murray* there were documents which, if not "formal," had certainly used technical language; the defendant's "continue as a quarterly tenant . . . under conditions which do not establish me as a controlled tenant" might well be read as an expression of intention to take some sort of tenancy and not a mere licence. The word "controlled" can, however, be treated as descriptive rather than as definitive, and the view taken by the learned judge reminds us of a warning once given by Wills, J., about the *expressio unius exceptio alterius* method of construction: "one that certainly requires to be watched. The failure to make the *expressio* complete very often arises from accident . . ." (*Colquhoun* v. *Brooks* (1887), 19 Q.B.D. 406).

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IT is an interesting sidelight on some current political emotions and even on a good deal of current political thinking that a late Attorney-General should feel it necessary to write an article in a daily paper: "Should I defend a Tory?" It is a question, apparently, which is often put to him and he feels that the ethical problem somewhat resembles that other one which is so familiar to us all on the lips of the layman: How can a lawyer defend a client whom he knows to be guilty? So, one deduces, even if the actual charge (in whatever court such charges may hereafter be preferred) were one of aggravated Toryism, there is the reassuring certainty that all the legal talent of the present Opposition would be at the service of the accused, for the learned author goes on very sensibly to point out that those who have an exclusive right to ply for hire must carry any passengers who come. And he quotes the great Erskine, in his day the supreme defender: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned . . . from that moment the liberties of England are at an end." But even Erskine didn't put it better than the massive common sense of Dr. Johnson: "Sir, a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice. It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer may not tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge and determine what shall be the effect of evidence, what shall be the result of legal argument . . . If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found to be very just." All this isn't just a niggling business of hair-splitting or a nebulous business of abstract justice. It simply means that guilt or liability are determined, not by roving intuitions or sentiments of general disapproval but by considering both sides, deciding what proves what and, having found what *is* proved, fitting it as neatly as may be into the known law. It means that in such an inquiry every English lawyer is to be ready to play any honest part assigned to him. And if that weren't the way of it, how safe would any of us feel?

WHY *MENS REA*?

THERE was once a royal lady who imagined, rather naively (if we may say so), that because she had actually seen a man shoot at her, he must *ipso facto* be guilty, and who accordingly felt the return of a verdict of "Not guilty. Insane" was an affront to her common sense. The amended verdict of "Guilty, but insane" is her permanent contribution to English criminal justice. Now, there is a school of thought which, if it were historically conscious enough to remember her point, would say "*Pas si bête.*" Bundling freewill and personal responsibility into the psychological junk-shop and refurnishing the courts with nice new scientific functional concepts, they would waste no time rummaging among the musty irrelevancies of guilt or malice or intention. If an anti-social act had been committed that would be enough; all crime would become as simple as a parking offence. A man would no more be guilty of murder or burglary than he would be guilty of typhoid fever. Find the fact and the experts would deal with him in the best interests of society. Only that trifling matter of human dignity and personality stands between you and this very convenient concept and if only you were content to be judged as a dog with rabies or a cow with "foot and mouth" what a lot of judicial man-hours would be saved.

CRIMINAL BOTTLE-NECK

BUT the whole conception of punishment and deterrents as hitherto applied is an appeal to free will, and the current revival of crime as a career seems to be rearousing in the law-abiding something of that righteous indignation which one does not feel towards a person merely suffering from an attack

would reduce the volume of litigation. On the other hand, some modernisation of the language of the definition seemed to the committee to be desirable, and its recommendation therefore, in this respect, is that the existing definition by reference to the preamble to the statute of Elizabeth I should be repealed and replaced by a definition based on Lord Macnaghten's classification, but preserving the case law as it stands.

It is difficult to assess the value of this recommendation, at any rate if one is a lawyer and familiar with the *Pemsel* classification, which, if modern authorities are consulted, will be found referred to in full fifty times or more for each occasion on which the Elizabethan catalogue, or a substantial part of it, is cited. Perhaps the utility of this recommendation is intended to be found elsewhere. In other parts of the report there are recommendations for bringing up to date, by means of an extension of the *cy-près* principle and of the power of making schemes for the reorganisation of charities, many of the existing charities which time has outmoded, and it is recommended that in this process of modernisation of charitable purposes local authorities, who already have a considerable share in the administration of certain charities by rights of nominating trustees and the like, should be even more closely associated. To the persons who compose these local bodies the present amorphous definition of charity is, doubtless, largely incomprehensible, and its reformulation in language which they will understand is therefore an advantage. To the lawyer, nothing much will change if this part of the report is eventually accepted and acted on, and certainly the settling of a charitable trust will remain as much the task of the expert draftsman as it is to-day.

"A B C"

Landlord and Tenant Notebook

CONTROLLED TENANT BECOMING LICENSEE

LAST year saw so many new decisions on the question whether some agreement created a tenancy or merely conferred a licence that I felt that the "Notebook" ought not to deal with them all in full. But, though the last occasion when it did deal with one was on 15th November last (96 SOL. J. 743), the decision then discussed being *Torbett* v. *Faulkner* [1952] 2 T.L.R. 659; 96 SOL. J. 747 (C.A.), I think that, apart from the great interest shown in the distinctions drawn, the more recent *Murray Bull & Co., Ltd.* v. *Murray* [1952] 2 T.L.R. 1003; 96 SOL. J. 852, merits an article. For one thing, the decision illustrated, fortuitously perhaps, the limits of what was decided in *Morrison* v. *Jacobs* [1945] K.B. 577 (C.A.); for another, it shows that even the acceptance of an offer to occupy "as a quarterly tenant," qualified it is true by "at an economic rental under conditions which do not establish me as a controlled tenant," may bring into being a licence only.

The plaintiff company owned the lease of a London house (rateable value £64) on the ground and first floors of which they carried on their business of research and analytical chemists. In June, 1939, they let the second floor (which could be approached through the building or direct from outside) to the defendant, then their managing director, for a term of seven years or until the termination of his managing directorship "whichever is shorter," the agreement being recorded in a board meeting minute subsequently signed by the defendant. When the term expired, the defendant was still the company's managing director, and in occupation of the flat; and for a time he continued to hold the office and the flat, receiving his salary and paying the rent reserved by the expired lease.

It may be convenient to deal at this point with the reliance subsequently placed by the defendant on *Morrison* v. *Jacobs*, on the strength of which he contended that he had become a statutory tenant when the seven years' term had so expired and he had "held over." *Morrison* v. *Jacobs* decided that, after the expiration of a fixed term, the landlord of controlled premises need not give notice to quit before suing for possession merely because he had since that expiration accepted rent. The argument that a tenancy from year to year had been created was rejected because, as MacKinnon, L.J., said, the essential factor in non-control cases was that when a landlord has acquired a right to possession but refrains from turning the tenant out and accepts rent from him "the parties by their conduct may, with reason, be held to have entered into a new contract of demise"; whereas when a tenant remained in possession "not by reason of any such abstention on the part of the landlord, but because the Rent and Mortgage Interest Restrictions Acts deprive the landlord of his former power of eviction, no such inference can properly be drawn." The quotations show how important is/are reason and the reason. And in *Murray Bull & Co., Ltd.* v. *Murray*, McNair, J., recognised the distinction, by reference to reason, between cases in which an inference of holding over by agreement and retaining possession under the Rent, etc., Restrictions Acts would correctly be drawn. In the case before him, he was satisfied that the employer-employee relationship co-existing between the parties made all the difference, and warranted a conclusion that the holding over was by agreement.

The next important event occurred in 1950. In July of that year the defendant resigned his directorship; the company, by its chairman, wrote that the resignation would take effect as from 31st August and that he would be required to vacate the flat by 31st December. On 25th August he wrote: "May I inquire whether I may continue as a quarterly *tenant* of, etc., at the end of December at an economic rental under conditions which do not establish me as a *controlled tenant*. I am looking for a house, etc.," and on 5th September the chairman replied: "The remaining as a quarterly *tenant* . . . is a matter in which I am only too pleased to meet you as I know the difficulty you will be having in finding a suitable house. No doubt you will appreciate that the company may need the flat in the course of the coming months and naturally I know I can rely on you to vacate the premises when they are required." The defendant answered: "I am glad to know that I may remain as quarterly *tenant* at . . . until I find a house or until the flat is required by the company," going on to offer to pay a *rental* assessed by a local agent as reasonable; on 4th October the chairman wrote back: ". . . in view of the fact that the company may require the premises in the not too distant future, I wish the *rent* now paid by you to stand." And on 27th March, 1951, the defendant having remained in possession and made payments accordingly, a new managing director wrote on the plaintiffs' behalf requiring possession "as from the end of the second quarter of this year."

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BUT the whole conception of punishment and deterrents as hitherto applied is an appeal to free will, and the current revival of crime as a career seems to be rearousing in the law-abiding something of that righteous indignation which one does not feel towards a person merely suffering from an attack

of pneumonia. But while there is an insistent demand that the consequences of crime should be known unequivocally to be very unpleasant indeed, there is no corresponding demand that trials should become more arbitrary. So you have the situation that day-to-day differences between ordinary citizens remain unheard and undetermined while the judges cope endlessly with the phenomena of social anomalies in the criminal courts. At the conclusion of the Manchester Assizes last year, when only one judge of those in the commission had been able to attend to the civil list, over 500 cases were held over as against about thirty disposed of. The Recorder of Liverpool is overworked as he has never been before, and says so with unambiguous emphasis. True, there is talk of a northern Central Criminal Court for Lancashire on the lines of London's Old Bailey, but many convicted persons will have passed through Strangeways Gaol before the strong wine of such a scheme has been poured and repoured through all the parliamentary and administrative bottle-necks. It is only now that we have repaired the bomb-damaged old Old Bailey, while the assizes courts of Manchester still lie in war-scarred ruins and the judges sit cramped in the magistrates' courts. Meanwhile the sole effective resource is to appoint more judges, but it is unfortunate that scarcely is Glyn-Jones, J., gained than Pritchard, J., is lost. However, the vacancy might well, in the circumstances, be filled by a specialist in criminal law. Since Birkett, L.J., went to the Court of Appeal and Humphreys, J., retired, the common law puisnes have not mustered a very impressive strength in that particular branch of their work. Byrne, J., was senior prosecuting counsel at the Old Bailey. Oliver and Cassels, JJ., had a good deal of experience in criminal work at the Bar. Few others have had as much. Incidentally, the call for new judges will doubtless revive the cry for an increase in their salaries to attract suitable men. But just in case there is the usual procrastination in doing something about it, far-sighted members of the Bar may be interested to know that one leader at least has intelligently provided against a catastrophic fall of income in the event of his being offered and accepting a seat on the Bench. He has purchased an annuity payable from the date of his appointment.

RICHARD ROE.

REVIEWS

Modern Equity. Sixth Edition. By HAROLD GREVILLE HANBURY, D.C.L., Vinerian Professor of English Law in the University of Oxford. 1952. London: Stevens & Sons, Ltd. £3 3s. net.

An Introduction to Equity. Third Edition. By G. W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law. 1952. London: Sir Isaac Pitman & Sons, Ltd. £2 5s. net.

The simultaneous appearance of new editions of these justly popular students' books affords an unusual opportunity of contrasting their authors' approach to one of the most difficult tasks of a teacher of law, the explanation of the place occupied by the equitable jurisdiction in our law. Both books begin with an historical introduction leading up to the changes effected by the Judicature Acts, 1873 and 1875. Professor Hanbury has hitherto maintained the view that the effect of that revolution was almost entirely confined to procedure and machinery, and that the substantive law was hardly touched by it; in this edition he confesses to some modification of his previously held view, but he is still miles away from Professor Keeton, whose opinion it has always been that the changes made in 1875 were fundamental. Practical experience of the two divisions of the High Court involved in this controversy suggests that the truth probably lies somewhere mid-way between these extremes; as an example, it is hardly conceivable that a litigant relying on a licence granted for value in proceedings in the Queen's Bench Division to-day would not be able to invoke with success doctrines that, before 1875, would only have been listened to in Lincoln's Inn; whereas now that the equity that is dispensed in the Chancery Division has narrowed down from precedent to precedent, and bristles with technicalities at every point, it can hardly be denied a title to an existence to some extent independent of the common law, however much history insists that the one is a sort of parasite on the other.

After their introductions these two books pursue different lines of treatment. Professor Keeton deals with most of the matters which, by rule or tradition, are litigated in the Chancery Division under, and as examples of the application of, the maxims of equity; a few additional sections on assignment of choses, appointments, persons not *sui juris*, and other topics not susceptible of that treatment complete the picture. This book thus contains no chapter or section specifically devoted to trusts. Professor Hanbury, on the other hand, finds plenty of space in his book, which is almost twice the length of the other, for separate chapters on such matters as mortgages, restrictive covenants and administration of assets, and for a complete section, occupying nearly a third of the whole volume, on trusts. Both books end with a full discussion of the specifically equitable remedies.

If one has to choose between these books, Professor Hanbury evinces an enthusiasm which should be ebullient enough to communicate itself in some degree to the student and help him along with a subject that is notoriously unpopular with novices. But Professor Keeton's rather drier method is also the shorter, and brevity in exposition is a quality that needs no recommendation to the student.

The Elements of Conveyancing. Eighth Edition. By JOHN F. R. BURNETT, of Gray's Inn, Barrister-at-Law. 1952. London: Sweet & Maxwell, Ltd. £2 7s. 6d. net.

The preface to this edition refers to a review of the last edition of the book printed in THE SOLICITORS' JOURNAL (88 SOL. J. 324). In that review it was suggested that the author should consider in future editions whether the book was to be for students or practitioners and adjust the scope of its contents appropriately. Relying on his experience of teaching the subject and on discussions with practitioners, he has reached the conclusion that he should leave the standard of the book unaltered. The present reviewer suggests that the result is a book undoubtedly of great value to students, but of diminishing value to practitioners. Although it is often necessary in practice to revise one's knowledge of principles, there are other books just as adequate for this purpose which point out many more of the traps for the unwary.

For these reasons one must regard Mr. Burnett's book as existing primarily for the use of students. Consequently, one cannot criticise the omission of modern statutes, such as the Leasehold Property (Temporary Provisions) Act, 1951, and the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, although a warning of their existence and general effect in an appropriate place is useful to a practitioner.

The book is not used very often by articled clerks, although it has two major advantages. First, its length is materially less than that of the most popular book on the subject, and so the general principles are easier to grasp at first reading. Secondly, for students who lack practical experience in conveyancing, the precedents are most valuable. Although it is not likely to take the place of "Gibson" it would be very useful to an articled clerk, particularly in his early days. From this point of view, however, it is unfortunate that the law relating to town and country planning and agriculture have been placed together in one chapter. It is most difficult

to fit these topics into an orderly classification, but the methods adopted in "Gibson" (that is, broadly, of explaining the Town and Country Planning Act in connection with inquiries before contract where it normally arises, and the Agricultural Holdings Act, 1948, in connection with leases) are much more successful.

"Current Law" Guide No. 9: A Guide to the Law of Intestates' Estates and Family Provision. By DONALD CHARLES POTTER, LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. 1952. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 8s. 6d. net.

This useful addition to the Current Law series is necessary as a result of the Intestates' Estates Act, 1952, which came into force on the 1st January, 1953. The guide contains a brief but accurate statement of the law relating to succession on intestacy and to family provision as it applies on death after 1952. The text of the 1952 Act is printed in the appendix, but the author has, quite rightly, stated existing rules and amendments as a whole instead of explaining each change in former rules separately.

This guide will be very helpful during the next few months, when solicitors will wish to ensure that they have not overlooked a provision affecting the estate of a deceased person. Judging it from the point of view of a practising solicitor, however, one would suggest that two improvements might be made. First, the explanation of the appointment and recommendations of the Morton Committee and of the history of the Bill (pp. 2, 3, 4 and 5) should be deleted and equivalent space devoted to a more complete explanation of the changes made by the 1952 Act. Secondly, even within the limits of so short a guide, in some respects more help might be given on problems which will be unfamiliar to many readers. For example, it is quite true that "no rules can be laid down as to what is 'reasonable provision'" for maintenance of a dependant (p. 38), but a few brief examples of decisions of the courts would be of great value to solicitors who have not yet been concerned with the operation of the Inheritance (Family Provision) Act, 1938. Similarly, most solicitors reading of the rights of a surviving spouse over the matrimonial home would ask at once whether a purchaser need inquire about their exercise, but no reference can be found in the text to Sched. II, para. 4 (5), of the 1952 Act, nor is there any mention of the conveyancing problems which may arise. A comprehensive statement of such matters would be well beyond the scope of a modestly priced Current Law Guide but a few notes of warning would be most welcome.

TALKING "SHOP"

January, 1953.

MONDAY, 5TH

In *House of Commons* (*Kitchen Committee*) v. *Haddock*, Mr. Justice Codd[1] observed that "it is the duty of a bank to keep the stream of commerce flowing and navigable, and to destroy, not to create, new obstacles[2] in the fair-way." Equally, the law should keep the queue of purchasers moving. I sympathise with "Country Solicitor" whose forthright letter (96 SOL. J. 693) lights up the cloud-cuckoo-land of delayed completions. It is certainly not in provincial offices alone that solicitors are dismayed by "the Alice in Wonderland spheres suggested by some of the decided cases."

In the leisurely Victorian days it may have been reasonable for a purchaser to outrun his completion date by three months, whilst his solicitor, stolid-keeper-like, pursued some undivided share through a hundred or more pages of brief. When conveyancers had to do without telephones, typewriters and the blessings—by some said to be doubtful—of Lord Birkenhead's legislation, it may have been reasonable; even of that one cannot be sure. But nowadays the tempo is faster and there are not enough houses to go round. Surburban house purchases are strung together like so many railway coaches or sausages; one defaulting or dilatory purchaser can set telephones ringing in a dozen offices. This (whether we call it progress or retrogress or by any other name) is what makes the talk of a two or three months' notice to complete seem unreal; nor does it help matters that the plaintiff is required to pause—though nobody knows for how long—before serving any notice at all.

TUESDAY, 6TH

A London correspondent makes the suggestion (96 SOL. J. 711) that in any future case of the *Smith* v. *Hamilton* type, the plaintiff might plead "an implied term that the sale and purchase were subject to the practice and usage of conveyancers." It is to be hoped that this village Hampden, when he appears, will be successful in following the course mapped out for him; he may have to travel as far as the Court of Appeal. Unhappily, the "implied term" resembles public policy, of which it was said that it is a "mettlesome horse." Nor might it prove easy to establish modern conveyancing practice and usage against all the weight of Victorian tradition. Defendant's counsel might observe, unkindly, that it takes more than a respectful distaste for the authorities to establish "practice and usage."

In the meantime, we have to take the law as we find it, or perhaps I should say as we can best discern it. I do not know of anything that prevents the parties from making their own bargain. If the law allows too long a period for slumber after the "date fixed," why not shorten it? I had already made a note to suggest this solution here and to draft a suitable clause, when another correspondent kindly supplied a copy of the clause now in use in Leicester (96 SOL J. 766). As our Leicester correspondent says, this clause in effect enables the vendor to make time of the essence of the contract by notice, without being forced to do so.

Possibly one reason why it is not as yet the universal practice to include such a clause in the draft contract—conservatism apart—is the reluctance of a vendor's solicitor to make a rod for his own back. After all, if the vendor may make time of the essence by notice, why should the purchaser not ask for and be given the same right? It is possibly some such reasoning as this that gives the vendor's solicitor pause; all is so much simpler if one can be sure that the other party will not serve the notice. None the less, the present uncertainty is not a good thing for either side. From the purchaser's point of view the "Leicester" clause does not seem to be ideal, but whether the contract adopts that or a different type of clause conferring a similar right on the purchaser, it does at least tend to clarify the position of the parties.

THURSDAY, 8TH

Readers of this column may remember that out of the kindness of his heart Mr. Sheep forbore to tell Rupert that he would have to unlearn a lot of the law that he was diligently studying (96 SOL. J. 867). Rupert is now learning the hard way; he has read the White Paper on the financial provisions of the Town and Country Planning Act, 1947 (Cmd. 8699). Sympathy for Rupert should not blind us to the merits of the White Paper—surely a masterpiece of succinct and lucid statement upon a difficult subject.

FRIDAY, 9TH

After some careful study of documents brought to me by Mr. *W*, including his grandmother's marriage settlement and will and counsel's opinion, I am driven to advise that his aunt

1. *Codd's Last Case*, by Sir Alan Herbert, p. 71.
2. The learned judge was plainly distracted by the egg-cheque in that case; his *dictum* is understood to refer to the destruction of obstacles, old or new.

Mary is under no obligation to bring into hotchpot a share of the marriage settlement funds that she receives under his aunt Martha's will; the unfortunate Mr. *W* and his sister *S*, *per contra*, must bring into hotchpot a like share of the same funds that they would have received if their mother had not inadvertently left it to their father. In brief, Mary does not have to account for a share that she receives; *W* and *S* do have to account for a share that they do not receive. The result, unsatisfactory as it is, follows inescapably upon the system of stirpital distribution adopted by Mr. *W's* grandmother in her will, which remained uncorrected despite the deaths of two daughters in her lifetime. The main interest of the case lies in the fact that Mr. *W* accepts his disappointment with the best possible grace, and even goes out of his way to write me a civil letter about it. This is, surely, virtue of no ordinary kind.

WEEK-END REFLECTIONS

Solicitors will not need Sir Ernest Gower's reminder that words have a "penumbra of uncertainty." Robert Graves and Alan Hodge in their well-known text-book on the English language[1] give some striking illustrations of a draftsman's difficulties. The problem being a park byelaw, the following suggestions and objections were advanced (I give only the substance of the objections):—

Suggestion	*Objection*
(1) No dogs must be brought to this park except on a lead.	(1) The order must be effective *inside* the park.
(2) Dogs are not allowed in this park without leads.	(2) The order should be addressed to the owners, not to the dogs.
(3) Owners of dogs are not allowed in this park unless they keep them on leads.	(3) Cannot a dog-owner leave his dog at home? (Yes, if he ties it up first).
(4) Nobody without his dog on a lead is allowed in this park.	(4) Then persons not owning dogs should be excluded from the park.
(5) Dogs must be led in this park.	(5) "A general injunction to the borough to lead their dogs into the park."

The winning entry was: "All dogs in this park must be kept on the lead." No wonder that some of us like to have a precedent book always at hand!

"ESCROW"

1. *The Reader over Your Shoulder* (Jonathan Cape), pp. 81/82.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

COURT OF APPEAL

LANDLORD AND TENANT: RIGHT OF TENANT TO DEDUCT PREVIOUS OVERPAYMENTS FROM RENT PAYABLE TO LANDLORD'S TRUSTEE IN BANKRUPTCY

Bradley-Hole *v.* Cusen

Somervell, Jenkins and Hodson, L.JJ. 1st December, 1952

Appeal from Hastings County Court.

The defendant, the tenant of a rent-controlled house, had paid rent in excess of the standard rent. On the bankruptcy of the landlord, the tenant claimed to deduct the excess so paid from subsequent rent becoming payable to the plaintiff, the trustee in bankruptcy, under s. 14 (1) of the Rent Act, 1920, which provides that in the case of an overpayment "the sum so paid shall be recoverable from the landlord . . . and any such sum . . . may . . . be deducted by the tenant . . . from any rent . . . payable by him to the landlord . . ." The county court judge, following *Kitchen's Trustee* v. *Madders* [1950] Ch. 134, held that the right of deduction claimed was not available against the trustee in respect of rent due from the date of the bankruptcy. The tenant appealed.

JENKINS, L.J., said that by s. 12 (1) of the Act "landlord" included "any person from time to time deriving title under the original landlord." *Kitchen's* case, *supra*, which had been applied below, did not touch the present question, but dealt with a set-off under the Bankruptcy Act, 1914, and the present point was open. The tenant contended that the reversion of the premises vested in the trustee subject to the statutory obligation of the bankrupt under s. 14 (1), and relied on *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; 96 SOL. J. 344, which showed that a trustee in bankruptcy takes the debtor's property subject to all fetters or liabilities affecting it in the hands of the debtor. The trustee, relying on *Titterton* v. *Cooper* (1882), 9 Q.B.D. 473, *Alloway* v. *Steere* (1882), 10 Q.B.D. 22, and *In re Wilson* (1893), 10 Morrell 219, contended that a trustee, who was not liable for a breach of covenant happening before his appointment, was similarly not concerned with previous overpayments of rent; and that there could be no set-off of overpaid rent, the claim for which was converted into a right of proof. But here the tenant had a statutory right to remain in the house rent free until the overpayments were satisfied; the principle in *Bendall* v. *McWhirter*, *supra*, applied, and the interest in the reversion vested in the trustee was subject to the tenant's right under s. 14 (1).

SOMERVELL and HODSON, L.JJ., agreed. Appeal allowed.

APPEARANCES: *L. A. Blundell* (*Preston, Lane-Claypon and O'Kelly*, for *John Ray & Son*, Hastings); *Muir Hunter* (*H. Boustred & Sons*, for *Percy Walker & Co.*, Hastings).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] [2 W.L.R. 193

POWER OF COURT TO AMEND MISNOMER OF PLAINTIFF

Etablissement Baudelot *v.* R. S. Graham & Co., Ltd.

Singleton, Birkett and Morris, L.JJ.

16th December, 1952

Appeal from Sellers, J.

The plaintiffs were the widow, son and daughter of one M. Baudelot, who was a manufacturer and merchant carrying on business at Montereau, France, until his death in 1937. After his death, the plaintiffs carried on his business, which was then known as Etablissement Baudelot. In 1949 and 1950, they supplied under contract to the defendants, an English company, firebricks valued at over £20,000. The defendants paid over a period about £15,000 to the plaintiffs, but in July, 1950, there was a balance owing to the plaintiffs of £5,331 2s. 4d., and proceedings were commenced for the recovery of that sum as the price of goods sold and delivered to the defendants. After some discussion with French lawyers as to the proper way to describe the plaintiffs, the writ was issued on 18th July, 1950, the plaintiffs being described as "Etablissement Baudelot." The plaintiffs' solicitors at the end of the back of the writ, purporting to comply with R.S.C., Ord. 4, r. 1, by indorsing the address of the plaintiffs and also their own name or firm and their own place of business within the jurisdiction, wrote: "This writ was issued by Messrs. Keene, Marsland & Co., whose address for service is 52 Mark Lane, London, E.C.3, solicitors for the said plaintiffs, a company incorporated according to the laws of France, whose place of business is situate at Montereau, France." The statement of claim was delivered in January, 1951, and the defence in March, 1951. There followed certain correspondence between the parties in 1951 as to the status of the plaintiffs and their capacity to sue as "Etablissement Baudelot," and the plaintiffs' solicitors, acting very properly, disclosed the circumstances and passed on to the defendants the opinion of the French lawyers whom they had consulted on the matter. In July, 1952, just as the action was about to come on for trial, the defendants, by their solicitors, issued a summons to strike out the name of the plaintiff, on the ground that the plaintiff was a non-existent person. To meet that and to save any question, the next day the plaintiffs' solicitors issued a summons for leave to amend by adding the names of the widow, son and daughter personally. The master referred the two summonses to the judge, and the action, with the two summonses, came before Sellers, J., in October, 1952. He allowed the plaintiffs to amend as desired by their summons, continued the hearing of the action and, after slight adjustment of the amount claimed, gave judgment for the plaintiffs. The defendants appealed.

SINGLETON, L.J., said that Sellers, J., was right in allowing the amendment by virtue of R.S.C., Ord. 16, r. 2. It was, therefore, unnecessary for him to consider the alternative

submission made on behalf of the plaintiffs that the court had inherent power (as distinct from the power to allow amendment under Ord. 16, r. 2) to allow amendment of a mere misnomer, such as the erroneous statement on the back of the writ that the plaintiffs were a company incorporated according to the laws of France.

BIRKETT, L.J., deplored the conduct of the defendants as being likely to injure the international commercial prestige of the United Kingdom, and he was glad that the court had power to allow amendment. The defendants had submitted that the statement that the Etablissement Baudelot was a corporate body vitiated the whole proceedings, writ being issued in circumstances comparable to those where the plaintiff was a dead man (as in *Clay* v. *Oxford* (1866), L.R. 2 Ex. 54, and *Tetlow* v. *Orela, Ltd.* [1920] 2 Ch. 24). But that was not so. The plaintiffs existed, and existed to the knowledge of the defendants. The question was not whether they existed as a corporate body because it had been conceded (rightly or wrongly) that that description of them was mistaken. The proper way of regarding that description was that it was a mere misnomer which the court had power to deal with under R.S.C., Ord. 72, r. 2.

MORRIS, L.J., agreed. Appeal dismissed.

APPEARANCES: *Leonard Caplan* (*Crawley & de Reya*); *Roland Adams*, Q.C., and *J. Donaldson* (*Keene, Marsland & Co.*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R 180

LANDLORD AND TENANT: BUILDERS' AND DECORATORS' PREMISES: WHETHER A "SHOP"

M. & F. Frawley, Ltd. *v.* The Ve-Ri-Best Co., Ltd.

Somervell, Jenkins and Hodson, L.JJ. 17th December, 1952

Appeal from Westminster County Court.

The plaintiffs occupied premises of which the defendants were the landlords. Outside were notices "Builders' materials supplied by retail," and "Keys cut." On entering the premises there was a small room in which pots of paint and packets of cement were displayed for sale to the public; beyond, in premises much greater in area, were offices and stores. The plaintiffs described themselves as builders and decorators; retail sales to the public were not an appreciable part of their business. The plaintiffs applied to the court for the grant of a new tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, which, by s. 10 (1), enabled the occupier of a "shop" to make such an application. By s. 20 (1) "'retail trade or business' has the same meaning as in the Shops Act, 1950," and "'shop' means premises occupied wholly for business purposes, and so occupied mainly for the purposes of a retail trade or business." By s. 74 (1) of the Shops Act, 1950, "...'retail trade or business' includes the businesses of a barber or hairdresser, the sale of refreshments or intoxicating liquors, the business of lending books or periodicals . . . and retail sales by auction . . ." The judge granted a new tenancy. The defendants appealed.

SOMERVELL, L.J., said that the definition of "retail trade or business" in the Shops Act primarily suggested the selling of goods rather than of services. It had been suggested that "business" was a word of wide import, while "retail" meant dealing with the public as distinct from persons in trade; but such a definition would go far beyond a "shop" and would include bankers; if such was a proper construction, the definition in the Shops Act would be unnecessary and absurd. The history of the legislation up to 1950 showed that the words were not capable of the wide construction contended for. A builder and decorator, who did the bulk of his work outside, was in quite a different category from a barber. The appeal should be allowed.

JENKINS, L.J., agreeing, said that the adjective "retail," though primarily applicable to the sale of goods to persons resorting to the premises in question, would apply by analogy to the sale of services (e.g., by a boot repairer, cleaner, or watchmender) in circumstances comparable to those in which the ordinary retail sale of goods was carried on. But the designation "retail" was wholly alien to the plaintiffs' business.

HODSON, L.J., agreeing, referred to *Toogood & Sons, Ltd.* v. *Green* [1932] A.C. 663 and *Turpin* v. *Middlesex Assessment Committee* [1931] A.C. 451. Appeal allowed.

APPEARANCES: *I. S. Warren* (*Warren & Warren*); *J. Asher* (*Crawley & de Reya*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] [1 W.L.R. 165

AGRICULTURAL HOLDING: LANDLORD'S RIGHT TO SUE ON BREACH OF A REPAIRING COVENANT DURING CONTINUANCE OF TENANCY

Kent *v.* Conniff and Another

Singleton, Birkett and Morris, L.JJ. 17th December, 1952

Appeal from Slade, J. (on a preliminary point).

The defendants, who were the tenants of an agricultural holding, committed breaches of a repairing covenant in their lease and failed to farm according to the rules of good husbandry. The landlord served on them a schedule of dilapidations and a notice under s. 146 of the Law of Property Act, 1925, requiring them to remedy the breaches of covenant within two months of the service of the notice. The tenants did not comply and, on 11th May, 1951, the landlord issued a writ claiming forfeiture of the term, which, by virtue of the Agricultural Holdings Act, 1948, would have become a tenancy from year to year after the expiry of the contractual term on 25th March, 1952. He further claimed damages for the breaches of covenant. At the hearing, the tenants contended that, by virtue of s. 57 of the Agricultural Holdings Act, 1948, the landlord could only claim compensation when the tenants quitted the holding on the termination of the tenancy, and that his claim for damages was, therefore, premature. Slade, J., held that the section did not apply and awarded damages. The defendants appealed.

SINGLETON, L.J., said that if s. 57 had been intended to deprive the landlord of the right to sue for damages during the term of the tenancy he would have thought that the draftsman would have said so expressly and that, in the absence of such a clear intention, no party ought to be deprived of his rights (see Scrutton, L.J., in *In re Arden & Rutter* [1923] 2 K.B. 865, at p. 878). Section 101 of the Act preserved the rights and remedies of landlord and tenant except where they conflicted with the statutory provisions. The defendants had sought to argue that s. 57, by providing compensation recoverable by the landlord at the end of the term, overrode his contractual right to claim damages for breach of covenant during the term. But that was not so. The section dealt with the position arising at the end of the term, but a wholly different position arose if there were breaches in the early stages of a long lease. Even if it could be said that the landlord might await the end of the lease and then claim compensation under s. 57 (3) there was no reason why he should do so; and, unless he framed his claim so as to adopt the procedure of s. 57, there was no provision in the Act giving him compensation for the damage he had sustained as a result of the breach of covenant by the tenant. Section 65 of the Act provided that neither landlord nor tenant could have any other remedy than compensation in any case for which the provisions of the Act provided compensation and it avoided any agreement to the contrary, but, as s. 57 did not apply, neither did s. 65. The landlord's claim to sue in the courts arose as soon as there were breaches of the covenant and was not postponed until the tenant quitted on the termination of the tenancy.

BIRKETT and MORRIS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *W. D. Collard* (*Rose, Johnson & Hicks*); *L. A. Blundell* (*Woodroffes*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.] [2 W.L.R. 41

HUSBAND AND WIFE: NULLITY: APPROBATION: KNOWLEDGE OF REMEDY

Slater *v.* Slater

Singleton, Birkett and Morris, L.JJ.

17th December, 1952

Appeal from Karminski, J.

The parties were married in 1945; but owing to the failure of the husband's genital organs to develop normally at puberty he was unable to consummate the marriage, although he made attempts to do so, and the trial judge held that for some time the parties were under the impression that it had been. The husband had been medically examined before the marriage, and been told that there was a grave danger that there might be no children, but that there was a fair chance that the marriage might be consummated. The husband informed the wife that he was willing not to go on with the marriage if she were frightened of what might result. In 1948 the wife, who was gravely disturbed by her failure to have a child, consulted a doctor, who told her that she was a virgin; and in 1949 she was given artificial insemination on several occasions from a donor not the husband. Later that year they adopted a child, who had lived with them

since April, 1949; and from then until July, 1951, when the wife presented her petition, the wife continued to live in the matrimonial home except for an absence abroad in 1950. In November, 1949, she told a doctor that she was contemplating "divorce" for non-consummation. She first received advice from a legal adviser at a Citizens Advice Bureau in February, 1951, when she was told for the first time, she said, that her remedy lay in a decree of nullity. Karminski, J., holding that "at any rate by the autumn of 1949 the wife was aware that her husband was incapable of consummating the marriage and was aware, though her knowledge was hazy, that the law provided a perfectly adequate remedy," dismissed the petition on the ground that she had by her conduct approbated the marriage.

SINGLETON, L.J., said that from the finding of Karminski, J., the court ought to assume that the wife was not aware that the law provided a remedy until the autumn of 1949 (although she herself put the date much later), which was after the adoption and the insemination. His lordship considered the subsequent history of the marriage, and said that he could find nothing which happened then which could be said to amount to approbation. He could not see that a woman who stayed on in the matrimonial home in the circumstances must thereby be said to have approbated the marriage, and there was nothing inequitable in her being granted a decree. It was clear from the judgment of Lord Selborne, L.C., in *G. v. M.* (1885), 10 App. Cas. 171, that before there could be approbation which would deprive a petitioner of the remedy which he or she sought, there must be knowledge of the facts and of the law, and the present case was therefore to be distinguished from *W.* v. *W.* [1952] P. 152.

BIRKETT and MORRIS, L.JJ., concurred. Appeal allowed.

APPEARANCES: *C. Shawcross*, Q.C., and *D. Henderson* (*R. H. Marcus*, Law Society Divorce Department); *Ashe Lincoln*, Q.C., and *T. Dewar* (*A. M. V. Panton*, Law Society Divorce Department).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law.] [2 W.L.R. 170

HUSBAND AND WIFE: MAINTENANCE: CONSENT ORDER: DEATH OF HUSBAND

Hinde *v.* Hinde

Birkett and Morris, L.JJ. 17th December, 1952

Appeal from Barnard, J.

The wife was granted a decree absolute on 23rd March, 1936. On 25th March, 1936, a maintenance order was made by consent. By that order it was provided that the husband should pay her "until her remarriage as from the date of the decree absolute . . . maintenance at and after the rate of £300 per annum gross . . ." The husband died in January, 1952, and the executors refused to make any further payments under the order, taking the view that it was for joint lives only. The wife applied for leave to issue execution against the estate or, alternatively, the executors; but the summons was dismissed by the registrar, whose decision was upheld by Barnard, J. *Cur. adv. vult.*

BIRKETT, L.J., reading his judgment, said that counsel for the wife had submitted that the omission of the words "joint lives" in the order had been deliberate and that that view was confirmed by the words "until remarriage." It had been submitted on behalf of the executors that if the order were to be regarded as an order of the court, which the court could enforce, it must necessarily be an order for joint lives only. (He referred to s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which was in force at the date of the order.) In his (his lordship's) view, if the order were to have validity as an order of the court it must be construed as an order made for joint lives; and the construction of the order, in its use of the name of the husband only, in the absence of any reference to the life of the wife as the period in which maintenance was to be paid, in the use of "until remarriage" in the context of the order, in the provision for maintenance of the child, all pointed to the order being one in which the liabilities of the husband were limited to the joint lives of husband and wife.

MORRIS, L.J., concurring, said that a consent order might amount to a contract, or be evidence or corroboration of a contract which had already been made. But if the court were invited to make an order by consent which was by one construction within its powers, but by another was not, the court would proceed on the basis that the order was an order made within the powers of the court until it was shown that the position was that the parties had merely made a contract and that the consent order was intended to be the embodiment or evidence of the terms agreed. The appeal must fail, for if the order were an order of the Divorce Court it was not made, and could not have been made, so as to operate beyond the period of joint lives. The possibility of asserting in an action, and of seeking to prove and establish, that there was a contract as alleged by the wife, could neither be excluded nor encouraged. Appeal dismissed.

APPEARANCES: *P. Wien* (*Rhys Roberts & Co.*, for *C. James Hardwicke & Co.*, Cardiff); *E. S. Fay* (*Hepherd, Winstanley and Pugh*, Southampton).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law.] [1 W.L.R. 175

HUSBAND AND WIFE: NULLITY: APPROBATION OF MARRIAGE

Tindall *v.* Tindall

Singleton, Birkett and Morris, L.JJ. 17th December, 1952

The parties were married in December, 1946. On 13th September, 1947, the wife's solicitor wrote to the husband stating that the wife intended to institute proceedings for nullity on the ground of the husband's incapacity to consummate the marriage. The husband at once left the matrimonial home. On 9th October, 1947, the wife issued a summons against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging desertion and persistent cruelty which was eventually dismissed on the 14th July, 1950. Her appeal to the Divisional Court was dismissed on the 11th January, 1951.

The husband, in August, 1951, petitioned for divorce on the ground of desertion. The wife by her answer alleged his incapacity to consummate the marriage, and the trial judge granted her a decree of nullity. The husband appealed. *Cur. adv. vult.*

SINGLETON, L.J., reading his judgment, said that the court would accept the finding of the trial judge as to the issue of incapacity. For the husband it had been further argued that, in any event, the wife had approbated the marriage and that it would be inequitable and against public policy were she now allowed to say that it was invalid. This proposition must be adopted. Well knowing that she had a remedy as to her husband's incapacity and what that remedy was, as the letter of 13th September, 1947, showed, she had submitted a case to the justices based upon the fact of that marriage and had persisted in that case on appeal. His lordship considered *G.* v. *M.* (1885), 10 App. Cas. 171, and said that such conduct constituted an unambiguous recognition of the marriage which made it inequitable as between the parties to entertain the prayer for nullity and also contrary to public policy that it should be granted.

BIRKETT and MORRIS, L.JJ., concurred. Appeal allowed.

APPEARANCES: *A. W. Stephenson* (*Smith & Hudson* for *Williamson, Stephenson & Hepton*, Hull); *Ernest Ould* (*Pearlman and Rosen*, Hull).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law.] [2 W.L.R. 158

CHANCERY DIVISION

COMPANY: WINDING UP OF FOREIGN CORPORATION: *EX GRATIA* PAYMENT TO FOREIGN LAWYER

***In re* Banque des Marchands de Moscou (Koupetschesky); Wilenkin *v.* The Liquidator (No. 2)**

Vaisey, J. 18th December, 1952

Application by liquidator.

In 1917, the *K* Bank, a Russian corporation, was dissolved by Soviet decree, having at the time assets and liabilities in England. After litigation, a winding-up order was made in 1932. *W*, a Russian barrister long resident in England, who had given much assistance in the litigation, lodged a proof for £850 for his services which the liquidator regarded as reasonable as to quantum, but which he rejected as unfounded in law; his rejection was upheld by Vaisey, J. ([1952] W.N. 151; [1952] 1 T.L.R. 739), who suggested that the registrar should consider ordering an *ex gratia* payment. An application was made to the registrar for a payment of £420 (on the footing that the assets were expected to realise 10s. in the £). The registrar considered that the application was premature and that the proper course was to await the attitude of the creditors. The matter was then referred to the court.

VAISEY, J., said that in normal circumstances he would have upheld the registrar's decision; but *W*, a Russian barrister of standing, had been of great assistance in the winding up; indeed, but for his activities, the matter might not have progressed at all. His help might be as great in the future as it had been in the past. Provided that the allowance of the claim was not

made (and it was not to be made) a basis for future *ex gratia* demands, the payment would be allowed, subject to an undertaking by *W* that he would continue to serve on the committee of inspection unless prevented by ill-health or other unavoidable cause, or unless excused further service by the court. Order accordingly.

APPEARANCE: *Raymond Walton* (*Slaughter & May*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] [1 W.L.R. 172

INCOME TAX: EXPENSES WHOLLY AND EXCLUSIVELY FOR PURPOSES OF TRADE: ADVERTISING

Morgan (Inspector of Taxes) *v.* Tate & Lyle, Ltd.

Harman, J. 18th December, 1952

Appeal by case stated from the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The commissioners held that a debt incurred by the respondents, Tate & Lyle, Ltd., for services rendered during a period of six months from March to September, 1949, was money wholly and exclusively laid out for the purposes of the company's trade under r. 3 (*a*) of Cases I and II of Sched. D to the Income Tax Act, 1918, and therefore admissible as a deduction from their profits for the purpose of income tax. The Crown appealed from that decision. The debt in question was for expenses incurred by the respondents in a propaganda campaign against proposals, stated by the Labour Party in 1949, to nationalise the sugar refining industry. The respondents were the proprietors of an extensive business which refined rather more than half of all the sugar refined in this country. The board of directors regarded the Labour Party's policy as a threat to the company's existence and determined to take such steps as might be open to them to resist it. To this end the company entered into an agreement on 31st March, 1949, with a firm known as Aims of Industry, Ltd., an independent company limited by guarantee, appointing Aims of Industry, Ltd., as the company's "public relations officer and advertising agent" for a period of five years. Of the money which was payable to Aims of Industry, Ltd., under that agreement for advertising was a sum of £15,339 15s. 2d., stated to be on account of "anti-nationalisation expenditure." It was this sum which was in dispute in the present case. The point was taken on appeal on the Crown's behalf that this expenditure was expenditure connected with the ownership and not the conduct of the business, alternatively, that the expenditure, even though laid out wholly for the purposes of the trade, was of a capital nature.

HARMAN, J., held (1) that the question whether the expenditure was deductible was a question of law; (2) that the expenditure had none of the characteristics of a capital nature, and was not income expense; (3) that the expenditure on this campaign was, like any other advertising expenditure, money laid out wholly and exclusively for the purposes of the trade within the meaning of r. 3 (*a*), and admissible therefore as a deduction from the company's profits for the purposes of income tax. *Ward & Co., Ltd.* v. *New Commissioners of Taxes* [1923] A.C. 145; 39 T.L.R. 90, distinguished; *Strong & Co. of Romsey, Ltd.* v. *Woodifield* [1906] A.C. 448; 22 T.L.R. 754, and *British Insulated and Helsby Cables, Ltd.* v. *Atherton* [1926] A.C. 205; 42 T.L.R. 187, discussed.

APPEARANCES: *Sir Reginald Manningham-Buller*, Q.C., S.-G., and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *J. Millard Tucker*, Q.C., *Roy Borneman*, Q.C., and *Desmond Miller* (*Pennefather & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law.] [1 W.L.R. 145

COMPANY: RIGHT OF BANKRUPT SHAREHOLDER TO VOTE WHILE REGISTERED

Morgan and Another *v.* Gray and Others

Danckwerts, J. 19th December, 1952

Motion (treated by consent as the trial of the action).

In April, 1952, *M* and *G* were the sole directors of and shareholders in B.E.P., Ltd., each holding fifty shares of £1 out of an authorised and paid-up capital of £100. By art. 18, a director's qualification was fifty shares. On 30th April, 1952, *M* was adjudicated bankrupt and vacated his directorship. In August, *G* appointed his wife to be a director, and called an extraordinary general meeting to pass a resolution deleting art. 18 and another article. *M* attended; he sought to vote, and tendered proxies in the alternative on behalf of himself and his trustee in bankruptcy, but *G* refused to admit either the vote or the proxies. The resolution was carried at an adjourned meeting. The same course was taken at further meetings held in October, at which Mrs. *G* was elected a director. An action was brought by *M* and his trustee against *G*, his wife and the company, claiming injunctions to restrain the defendants from acting upon the resolutions, on the ground that they were invalid by reason of the exclusion of *M's* votes or proxies.

DANCKWERTS, J., said that it was curious that the precise point had not come up for decision before. In *Wise* v. *Lansdell* [1921] 1 Ch. 420 a bankrupt on the register was treated as entitled to vote, but there the shares had been mortgaged, and the trustee had disclaimed the equity of redemption, so that the bankrupt was a trustee for the mortgagees. In *In re Cape Breton Company* (1881), 19 Ch. D. 77, it was held that a bankrupt could not be a contributory of a company in liquidation, but that case was wholly distinguishable, as ss. 77 and 216 of the Companies Acts of 1862 and 1948, respectively, showed that the trustee in bankruptcy was for all purposes to be regarded as the contributory. But where the company was still in operation, and the bankrupt was still the proprietor on the register, the bankrupt still remained a member and the person entitled to vote and tender proxies, unless there was express provision to the contrary in the articles. The articles in question, which contained much of Table A to the Companies Act, 1929, went no further than providing, by arts. 106 and 107 of Table A, that notices of meetings should be sent to a trustee in bankruptcy of a member. It followed that *M* was at all material times a member, and entitled to exercise his vote and to tender proxies, subject to the direction of his trustee. The plaintiffs were, accordingly, entitled to the relief claimed. Judgment for the plaintiffs.

APPEARANCES: *Harold Lightman* (*McKenna & Co.*); *H. A. H. Christie*, Q.C., and *Brian Parker* (*Stafford Clark & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] [2 W.L.R. 140

SOLICITOR: NEGLIGENT ADVICE TO DECEASED CLIENT: MEASURE OF DAMAGES

Otter *v.* Church, Adams, Tatham & Co.

Upjohn, J. 19th December, 1952

Action.

Under the dispositions of the will of a testatrix, dated in 1899, *M.O.* became in 1941, when he was eighteen, tenant in tail, with remainder over to his uncle in tail, of settled property valued at about £7,000. The plaintiff, the mother and guardian of *M.O.* (his father having died), then consulted the defendants, a firm of solicitors, regarding the nature of *M.O.'s* interest in the settled property, and was advised that *M.O.*, on attaining twenty-one, would become absolutely entitled to the interest in question. In 1942, *M.O.* joined the Royal Air Force, and trained for flying duties. In December, 1944, when he was so serving in India and had come of age, the plaintiff, as his agent, again consulted the defendants as to what steps he should take to transfer the settled property to himself; she was advised that the most convenient course was to do nothing until *M.O.* returned to England. The plaintiff informed *M.O.* accordingly. In May, 1945, *M.O.* was killed in a flying accident, intestate and a bachelor, having neither executed a disentailing assurance nor disposed by will of the settled interest, which accordingly passed to his uncle. The plaintiff, as administratrix of *M.O.*, brought an action against the defendants, alleging that they had been negligent in their advice, as a result of which (1) *M.O.* had refrained from executing a disentailing assurance or devising the settled property by will under s. 176 of the Law of Property Act, 1925, or (2) *M.O.* was deprived of the opportunity of considering whether he should execute such instruments, so that (3) his estate had suffered damage and been decreased in value.

UPJOHN, J., said that the law was plainly laid down in *Nocton* v. *Ashburton* [1914] A.C. 932 that a solicitor contracted with his client to use skill and care and was liable for a failure to perform his obligation. The defendants had been neither skilful nor careful, as they had completely misread a provision in a will expressed in ordinary form, and had given bad advice at a time when, as they knew, their client was engaged on dangerous duties. It had been argued that the mistake had been made in 1941, when the defendants owed no duty to the deceased, but to the plaintiff personally. But when a solicitor was required to advise a young man who had just attained twenty-one, what steps he should take regarding his estate, it was the duty of the solicitor to inform himself correctly regarding the nature of the

estate; he could not rely on a previous mistake. The defendants had been negligent from start to finish and so a breach of contract was established. As to damages, the defendants had contended that the plaintiff could recover no more damages than the deceased could have recovered in his lifetime; such damages must be nominal, because, on the discovery of the mistake, it could be rectified by a stroke of the pen. The plaintiff contended, and, rightly, that she, as personal representative, had a right of action and that the damages must be ascertained in accordance with the usual rules, at the time when they accrued, and that they were such as would naturally be expected to flow from the breach. Damages accrued at the death of the deceased, and it was impossible to say that they could only be nominal. The deceased had been deprived of the opportunity of increasing his estate by the execution of a disentailing assurance. It was more than a remote possibility, as everyone knew, that he might be killed on active service. In the circumstances of the case, there was a serious possibility that failure to give correct advice would lead to the loss to the deceased's estate of the whole of the settled property. Taking everything into consideration, the plaintiff, as administratrix, should be awarded £6,500. Judgment for the plaintiff.

APPEARANCES: *C. Montgomery White*, Q.C., and *H. MacMaster* (*Steadman, Van Pruagh & Gaylor*); *P. Ingress Bell*, Q.C., and *I. J. Lindner* (*Hair & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.] [1 W.L.R. 156

QUEEN'S BENCH DIVISION

MINIMUM SCALE OF WAGES: CATERING ESTABLISHMENT: RESTAURANT: WORKER "EMPLOYED IN": "DEEMED TO BE EMPLOYED IN"

Pauley *v.* Kenaldo, Ltd.

Birkett, L.J. (sitting as an additional judge of the Queen's Bench Division). 18th December, 1952

Action.

The plaintiff was verbally engaged by the defendants, the proprietors of a restaurant, as a cloakroom attendant. By the terms of her agreement she was to receive no salary, but was to be allowed to keep all the tips received. Nothing was said to her about employment or insurance cards or about clocking in or using the staff entrance as was required of other servants, and when she desired an evening off she was required to provide and pay for a substitute. She was regarded by the defendants as a self-employed person running the cloakroom "on her own." She left the defendants' service and thereupon claimed to be entitled to the minimum scale of wages laid down for a cloakroom attendant by the Wages Regulations (Licensed Residential Establishment and Licensed Restaurant) Order (S.I. 1949 No. 908), made pursuant to powers conferred by the Catering Wages Act, 1943. Section 1 (2) of the Act provides that "the workers to whom the Act applies are all persons employed in an undertaking" coming under the Act, which includes a restaurant. By s. 1 (4), "any worker who, for the purposes of any undertaking performs any work in pursuance of any arrangement . . . made by the worker by way of trade with the persons carrying on that undertaking shall be deemed to be employed in that undertaking . . ." The defendants denied that the plaintiff came within the terms of either subsection.

BIRKETT, L.J., in a written judgment, said that the plaintiff's case in its simplest form was that she came within the provisions of the Catering Wages Act, 1943, while the defendants said that she did not. It was first contended that she was "employed" under an oral contract of service within the meaning of s. 1 (2) of the Act. That was a question of fact in each case and, as laid down in *Gould* v. *The Minister of National Insurance* [1951] 1 K.B. 731; [1951] 1 T.L.R. 341 and earlier authorities, the test whether the relationship constituted a contract of service was the extent of the control exercised by the master over the method in which the servant was to do the work. In the present case he had come to the conclusion that there was no contract of service, since although the defendants could suspend or dismiss the plaintiff they did not control the manner in which she should do her work. It was next said that the meaning of "employed" in s. 1 (2) was merely that of "working in" but he could not accept that contention since, if that was the interpretation to be put on the words, it was strange that Parliament did not use the words "working in" instead of the word "employment." In his view, therefore, the plaintiff failed to bring herself within s. 1 (2) of the Act. The substantial question was whether she came within the terms of s. 1 (4) and was to be "deemed to be employed" in the defendants' undertaking. It was not contested that she was a "worker" within the meaning of subs. (4) and her work was for the purpose of an undertaking and was performed in pursuance of an express arrangement made by the worker with the defendants who were carrying on the undertaking. The crucial question that remained was whether the arrangement was made by the worker "by way of trade." It was submitted for the defendants that "by way of trade" meant that the worker must be carrying on a specific trade and had made the arrangement as such trader. He had derived assistance from the decision in *Skinner* v. *Jack Breach, Ltd.* [1927] 2 K.B. 220; 43 T.L.R. 484, where the meaning of the words "by way of trade" in the Trade Boards Act, 1909, was considered, and he had come to the conclusion that if there was an arrangement made by the worker with the persons carrying on the undertaking and that arrangement provided for the worker to do the kind of work to which a minimum rate of wages applied and the arrangement was "by way of trade" using and interpreting the term in the sense of commercial employment, the worker was to "be deemed to be employed by the persons carrying on the undertaking." That was the position of the plaintiff on the facts of the present case, and she was therefore entitled to judgment for the sum claimed in respect of arrears of wages.

APPEARANCES: *Patrick O'Connor* (*L. Bingham & Co.*); *Rodger Winn* (*Fladgate & Co.*).

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law.] [1 W.L.R. 187

FACTORY: PNEUMOCONIOSIS: DANGEROUS DUST IN STEEL FOUNDRY

Adsett *v.* K. & L. Steelfounders & Engineers, Ltd.

Parker, J. 8th December, 1952

Action.

Before 1940 the defendant steelfounders, in an endeavour to eliminate dangerous dust from the atmosphere of their foundry, installed grids and gratings through which sand was shovelled and on which castings were knocked out. This was an improvement on the current method of knocking out castings, and in 1942 the defendants installed an extractor plant underneath the gratings to draw off dust, which made a further improvement in conditions in the foundry and at that time was quite new in the industry. The defendants also issued masks to their employees and instructed them to wear them. The plaintiff was employed by the defendants in various capacities in their foundry from 1940 to 1948. By 1943, although it was not then diagnosed, he had contracted pneumoconiosis as a result of breathing the dust in the foundry; by 1948 his condition had become aggravated and he was permanently disabled. The plaintiff had not worn his mask when working in the foundry. In the action the plaintiff claimed damages on the ground that his condition was caused and aggravated by negligence and breach of statutory duty on the part of the defendants in that, among other things, they took no steps to safeguard him from the dust or to provide exhaust fans or appliances and that they were, in the circumstances, in breach of s. 47 of the Factories Act, 1937. The defendants denied liability.

PARKER, J., said that the obligation under s. 47 of the Factories Act was to do something if it was "practicable." "Practicable" imposed a stricter standard than "reasonably practicable" but the measures to be taken must still be possible and possible in the light of current knowledge and invention at the time. The defendants had been the first in the industry to introduce grids and gratings to eliminate the dust, and the combination of a grid and extractor plant for the purposes of eliminating the dust hazard produced by knocking out moulds was new at the time when it was installed, and was not then part of current knowledge and invention. Between 1940 and 1942 the method now perfected for eliminating the hazard was not known and was not practicable within the meaning of that word in s. 47. Different considerations applied to masks in a case like the present than to those applied in *Clifford* v. *Challen* [1951] 1 All E.R. 72, to the provision of barrier cream. The plaintiff had chosen not to wear his mask; it was almost impossible to induce men to do what was almost impossible for them to do, and wear a mask for heavy shovelling, and the defendants had taken reasonable steps to induce their employees to wear masks. He, therefore, was not satisfied that the plaintiff's pneumoconiosis was contracted or aggravated as a result of any breach of statutory or common-law duty by the defendants. Judgment for the defendants.

APPEARANCES: *D. P. Croom-Johnson* (*W. H. Thompson*); *P. M. O'Connor* (*Clifford-Turner & Co.*).

[Reported by Miss J. F. LAMB, Barrister-at-Law.] [1 W.L.R. 137

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Act of Sederunt (Fees in the Department of the Keeper of the Records of Scotland), 1952. (S.I. 1952 No. 2276 (S. 120).)
Aerated Waters Wages Council (Scotland) Wages Regulation (Amendment) (No. 2) Order, 1952. (S.I. 1952 No. 2287.) 5d.
Approved Schools (Contributions by Local Authorities) Regulations, 1953. (S.I. 1953 No. 2.)
Beer Regulations, 1952. (S.I. 1952 No. 2232.) 11d.
Birkenhead and Wallasey Water Order, 1952. (S.I. 1952 No. 2273.) 6d.
Bristol Waterworks (Clevedon) Order, 1952. (S.I. 1952 No. 2274.) 8d.
Brush and Broom Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952. (S.I. 1952 No. 2288.) 6d.
Great Ouse River Board (Bluntisham Internal Drainage District) Order, 1952. (S.I. 1953 No. 1.) 5d.
Importation of Plants (Amendment) Order, 1952. (S.I. 1952 No. 2277.)
Ipswich — Newmarket — Cambridge — St. Neots — Bedford — Northampton — Weedon Trunk Road (Bottisham Diversion) Order, 1952. (S.I. 1952 No. 2305.)
London Traffic (Jewels Hill and Salt Box Hill, Orpington) Regulations, 1952. (S.I. 1952 No. 2303.)
London Traffic (Prescribed Routes) (No. 29) Regulations, 1952. (S.I. 1952 No. 2304.)
Methylated Spirits Regulations, 1952. (S.I. 1952 No. 2230.) 11d.
Regulation of Disposal of Stocks Licence Revocation, 1952. (S.I. 1952 No. 2278.)
Retention of Cable under Highway (Norfolk) (No. 1) Order, 1952. (S.I. 1952 No. 2310.)
Retention of Cables over and under Highways (Norfolk) (No. 2) Order, 1952. (S.I. 1952 No. 2311.)
Retention of Mains under Highways (Aberdeen) (No. 1) Order, 1952. (S.I. 1952 No. 2306.)
Spirits Regulations, 1952. (S.I. 1952 No. 2229.) 11d.
Stopping up of Highways (Bristol) (No. 1) Order, 1952. (S.I. 1952 No. 2307.)
Stopping up of Highways (Cornwall) (No. 4) Order, 1952. (S.I. 1952 No. 2279.)
Stopping up of Highways (Durham) (No. 3) Order, 1952. (S.I. 1952 No. 2280.)
Stopping up of Highways (Gloucestershire) (No. 4) Order, 1952. (S.I. 1952 No. 2309.)
Stopping up of Highways (Middlesbrough) (No. 2) Order, 1952. (S.I. 1952 No. 2308.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d. post free.]

NOTES AND NEWS

Honours and Appointments

The Queen has been pleased to approve the appointment of Mr. HILDRETH GLYN-JONES, Q.C., to be a Judge of the High Court of Justice.

The Queen has been pleased to appoint Mr. DAVID MORGAN EVANS to be Deputy Chairman of the Court of Quarter Sessions for the County of Cardigan.

Mr. J. BROCK ALLON, Town Clerk of Wolverhampton, has been appointed chairman of the Law Committee of the Association of Municipal Corporations.

Mr. PETER MOORE, prosecuting solicitor for the Railway Executive for the Manchester area, has been appointed to the legal section of the North-Eastern Region of the Executive.

Mr. FRANCIS NOEL DYKES PRESTON has been appointed as Presiding Special Commissioner of Income Tax in succession to Sir George R. Hamilton, who is retiring on 31st March, 1953.

Lt.-Col. D. H. LLOYD, T.D., solicitor, of Nuneaton, has been appointed to command 623 L.A.A. Regiment, R.A. (Warwick), T.A. He succeeds Lt.-Col. L. P. WALLEN, M.C., formerly senior assistant solicitor with the Warwickshire County Council, who has recently been appointed Deputy Clerk to Somerset County Council.

Miscellaneous

CENTRAL LAND BOARD: REVISED SET-OFF ARRANGEMENTS

The following press notice (CLB/48) was issued on 9th January by the Central Land Board:—

It was announced last May that when a developer is the beneficial owner of a claim under Pt. VI of the Town and Country Planning Act, 1947 (or Pt. V of the Scottish Act), the value of which has been determined, the Central Land Board would accept an amount not exceeding 80 per cent. of its face value as security for the payment of any development charge due from the developer.

In the light of the Town and Country Planning Bill, 1952, the Board have now been authorised to accept 100 per cent. of the value of a claim as security for payment of charge* where the claim is in respect of the land developed. Where the claim is in respect of other land they will continue to allow up to 80 per cent. as security, provided the claim was originally made by the developer or passed to him by operation of law or by virtue of an assignment made (or an assignation granted) before 18th November, 1952, and notified to the Board by 31st December, 1952.

The Board cannot make any repayments to developers who have paid a balance of development charge after giving 80 per cent. of their claim as security.

[* This refers to development charge which is payable because the development started before 18th November, 1952, or was included in a determination of development charge or an application for determination with other development begun before that date.]

L.C.C. DEVELOPMENT PLAN INQUIRY

OBJECTIONS CONCERNING KENSINGTON AND CHELSEA

Objections relating to Kensington and Chelsea will begin to be heard at 10.15 a.m. on Monday, 26th January, at the inquiry into objections to the development plan for the County of London.

NATIONAL HEALTH SERVICE TRIBUNAL

The telephone number of the Clerk to the National Health Service Tribunal has been changed to CHAncery 3783.

Applicants for Silk who wish their names to be considered for the next list of recommendations should send their applications to the Lord Chancellor's Office before Monday, the 9th February, 1953. Those who have already made applications should renew them before that date.

SOCIETIES

The next quarterly meeting of the LAWYERS CHRISTIAN FELLOWSHIP will be held at The Law Society's Hall, Bell Yard, W.C.2, on Wednesday, 21st January, 1953, at 6 p.m. Tea will be available from 5.30 p.m. The meeting, to which all lawyers, law students and visitors are warmly welcomed, will be addressed by J. N. D. Anderson, Esq., O.B.E., M.A., LL.B., on the subject "The Evidence of the Resurrection."

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 102–103 Fetter Lane, London, E.C.4. Telephone: CHAncery 6855.
Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).
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